Filed Dec. 29, 1902.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 231.

JAMES BRYAN, JR., EMMA T. BRYAN, SAMUEL H. BRYAN, EDGAR S. BRYAN, JESSIE T. BRYAN, NETTIE T. BRYAN, and SUSAN BRYAN, Heirs-at-Law of Jane Bryan, Deceased,

Plaintiffs,

vs.

THOMAS CAMPBELL,

Defendant.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellant.

(17,317.)

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IN THE

Supreme Court of the United States,

No. 227 OCTOBER TERM, 1899.

JAMES BRYAR, JR. *et al.*, HEIRS OF JANE BRYAR, deceased, APPELLANTS,

VERSUS

THOMAS CAMPBELL, APPELLEE.

BRIEF EX-PARTE APPELLANTS.

HISTORY OF THE CASE.

In the year 1837 James McElroy died intestate, leaving as his heirs seven children, to wit: S. B., John, James, Eliza, Susan, Mary and Jane. At No. 46 June Term, 1850, Orphans' Court of Allegheny county, Pa., partition was had of the real estate of said decedent, and the same was by the inquest divided into seven purparts and valued as then directed by law. The lot in dispute, being purpart No. 6, containing seven acres, was chosen by John McElroy, and allotted to him by the court. S. B. McElroy chose purpart No. 1; Eliza, No. 2; Mary, No. 3; James, No. 7. Purparts Nos. 4 and 5 were not taken at valuation and ordered to be sold. On the settlement of the estate in partition there was due and owing to Jane McElroy (afterwards Jane Bryar) the sum of $2,528.73, which was to be paid by Samuel B. McElroy. For this sum said S. B. McElroy paid his sister, Jane, $952.02 cash, and assigned to her a note of their sister, Eliza, date March 18th, 1852, to his order, payable on demand for $1,576.71, with

interest; said payment being made and note assigned on March 23d, 1852. Some months after this Jane McElroy married James Bryar.

On the 10th day of June, 1856, John McElroy conveyed said purpart No. 6 (the seven acres in dispute) to S. B. McElroy and James Bryar, their heirs and assigns. There was a dwelling house on the property at date of partition and conveyance by John. In the year 1857 James Bryar, with his wife, moved on said premises and made improvements and, perhaps, additions. About the 17th of March, 1863, S. B. McElroy agreed with his sister, Jane Bryar, that as their sister Eliza was not able to pay said note held by Jane, and as he considered himself liable therefor, he, in consideration of the surrender of said note, would convey to her the undivided one-half of said purpart No. 6 (the seven acres in dispute), held by him as tenant in common with James Bryar. Said Jane Bryar sent said note by her husband to S. B. McElroy, and he and his wife executed a deed for his half of the property, as he thought, to his sister Jane, but through a mistake or other cause the deed was made to James Bryar. There was due on this note to Jane Bryar, at date of surrender, over $2,500. The only money ever received on this note by Jane Bryar was the first year's interest. A year or so after the execution of the deed by S. B. McElroy and wife for his half of the seven acres, James Bryar informed his wife that the deed was to him, and that it was recorded. She told her husband repeatedly that she wanted it changed to her, but he told her it was perfectly safe. The mistake was never corrected. James Bryar and Jane, his wife, continued in actual possession of the premises (the seven acres in dispute) from the year 1857 to the month of September, 1878, when they were dispossessed by an order of the United States District Court for the Western District of Pennsylvania, ex-

pressing that it is without prejudice to Mrs. Bryar's title, made at No. 2742, in Bankruptcy Estate of James Bryar. Appendix, page 35

On the 1st day of October, 1874, James Bryar, without the knowledge or consent of Jane Bryar, his wife, executed two mortgages on said seven acres, one to Thomas McClintock for $3,000, and one to Ed. R. James for $2,000, both being recorded October 2, 1874, in the Recorder's office of Allegheny county, in Mortgage Book, vol. 161, pages 637, 638, 639 and 640.

On the 8th day of January, 1877, James Bryar was adjudged a bankrupt on the petition of his creditors, at No. 2742 in Bankruptcy, District Court of the United States for the Western District of Pennsylvania, and on the 8th day of February, 1877, Robert Arthurs was chosen assignee of his estate, and the property of said bankrupt duly conveyed to him according to law. The said assignee being about to sell said seven acres as the property of James Bryar, bankrupt, when the said Jane Bryar, by her next friend, Robert Bryar, on the 30th of April, 1877, filed her bill of complaint against said James Bryar and Robert Arthurs, his assignee, asking the court, among other things, to restrain said assignee from exercising control or jurisdiction over her interest in said seven acres, said bill of complaint being the case at bar.

The assignee, notwithstanding the pendency of this bill, proceeded to and did, on the 4th day of May, A. D. 1878, sell at public sale the interest of said James Bryar, bankrupt, in said seven acres, to Thomas Campbell, for the sum of $3,500, subject to the payment of the two mortgages aforesaid, as will appear by the deed of Robert Arthurs, assignee of James Bryar, bankrupt, to Thomas Campbell, dated May 22d, 1878, recorded in the Recorder's office of Allegheny county, in Deed Book, vol. 377, page 668. At the date of

this purchase Thomas Campbell had notice of the claim of Jane Bryar to the undivided half of the land, and of the pendency of this bill in equity, and after his aforesaid purchase, to wit: On the 15th of August, 1878, on motion of Rodgers & Oliver, his attorneys, the court allowed him to intervene and make defense to said bill in equity. And on the 25th day of June, 1879, the court allowed complainant to amend her said bill, and on June 26th, 1879, after hearing and argument, the court decreed for the plaintiff for land described in bill, from which decree said Campbell appealed, on the 16th day of July, 1879, to the next Circuit Court. Jane Bryar, plaintiff and appellee, having died on the 28th day of August, A. D. 1890, her death was, on the 27th day of January, 1896, suggested to the court, it was ordered that James, Jr., Emma S., Samuel B., Edward S., Jennie H., Hattie S. and Susan Bryar, her heirs at law, be substituted as plaintiffs and appellees. On the 28th day of January, 1896, plaintiffs moved the court to decree appeal of Campbell deserted, dismiss same, and to affirm decree of District Court, which motion was denied, and the court made an order allowing appellant leave to perfect his appeal and take additional testimony.

Testimony having been taken by appellant under said order it was shown:

That on the —— day of March, 1878, writs of *scire facias* were issued (by leave of the United States District Court granted *to collect* them) on the two mortgages given by James Bryar to Edward R., James and Thomas McClintock, at Nos. 204 and 205 June Term, 1878, Court of Common Pleas No. 1 of Allegheny county, which were duly served, and on April 12th, 1878, judgments were duly entered in default, *sec. reg.* in No. 204 for $2,355.88, and in No. 205 for $3,533.75, which judgments were on the 7th day of June, A. D. 1878 purchased by Thomas Campbell, appellant.

That on judgment at No. 204 June Term, 1878, a writ of *levari facias* was issued, on the 15th day of April, 1878, to No. 195 June Term, 1878, which said writ was on the 30th day of June, 1878, returned by the sheriff "stayed, costs paid by W. B. Rodgers, Esq." That on the 15th day of August, 1879, an alias writ of *levari facias* was issued to No. 277 September Term, 1879, all the above writs being in the Court of Common Pleas No. 1 of Allegheny county, Pa., upon which said writ the property in dispute was sold on the 6th day of September, 1879, to W. B. Rodgers, Esq., agent and attorney for said Thomas Campbell, for the sum of $50, a deed made and duly acknowledged by Thomas H. Hunter, Esq., sheriff, on the 20th day of September, 1879, and delivered to said Rodgers, which said property said Rodgers purchased for and with the money of and afterwards conveyed to Campbell. (See Record, page 48.)

That on the 30th day of August, 1879, and before the said sheriff's sale, Jane Bryar by her next friend, Robert Bryar, presented her petition to the said Court of Common Pleas No. 1 of Allegheny county, Pa., at Nos. 204 and 205 June Term, 1878, praying that she be permited to pay unto court the equal one-half of said two judgments, debt, interest and costs, and upon so doing have the one-half of said judgment, debt, interest and costs marked for her use or for such person or persons as she may appoint. The court granted a rule to show cause, returnable September 3, 1879, at 10 o'clock A. M., and in the meantime all proceeding against the interest in said land claimed by Jane Bryar stayed.

And on September 6th, 1879, said rule was discharged.

On the —— day of January, A. D. 1880, James Bryar and Jane Bryar, his wife, in right of said wife, commenced an action in ejectment in the Court of Common Pleas No. 1, of Allegheny county, against John W. Beckett, W. B. Rodgers and Thomas Campbell, for the land in dispute, said cause

having came on for trial before a jury a verdict for defendant was rendered under instructions of the court, from which plaintiffs appealed to the Supreme Court of Pennsylvania, at No. 184, October and November Term, 1881, which said court by a per curiam affirmed the lower court.

After hearing the Circuit Court below on the 5th of February, 1897, filed a decree reversing the decree of the District Court, from which decree appellants appealed to the Circuit Court of Appeals, Third Circuit, which court on the 9th December, 1898, affirmed decree of said Circuit Court.

CHRONOLOGICAL ORDER OF FACTS.

S. B. McElroy's deed to James Bryar, undivided half of 7 acres.	March 17, 1863.
James Bryar to E. R. James, Mortgage $2,000.	Dated Oct. 1, 1874. Recorded Oct. 2, 1874.
James Bryar to Thomas McClintock. Mortgage $3,000.	Dated Oct. 1, 1874. Recorded Oct. 2, 1874.
James Bryar to Thos. Campbell, three notes, in all $26,717.92, for sale of mill.	Dated Oct. 1, 1874.
Thos. Campbell vs. James Bryar et al. $7,329.81. Judgment at No. 951 Mch. T., 1876, C. P. No. 1, Ally. Co., Pa.	Feby. 10, 1876.
Thos. Campbell vs. James Bryar. $9,059.36. Judgt. at No. 953 Mch. T., 1876, C. P. No. 1, Ally. Co., Pa.	Feby. 6, 1876.
Petition of creditors to have James Bryar declared a bankrupt.	Filed May 19, 1876.

James Bryar adjudicated a bankrupt.	Jany. 8, 1877.
Robert Arthurs chosen assignee.	Feby. 8, 1877.
Register's deed to Robert Arthurs, assignee.	Feby. 24, 1877.
Mrs. Bryar's Bill in Equity vs. Robert Arthurs, assignee, and James Bryar. Dist. Court, U. S.	Filed April 30, 1877.
E. R. James' judgt. on mortgage vs. James Bryar, Com. Pleas No. 1, Ally. Ca., Pa.	April 12, 1878.
Robert Arthurs, assignee, sold to Thos. Campbell, James Bryar's interest in seven acres for $3,500 and mortgages.	May 4, 1878.
Robert Arthurs, assignee, deed to Thos. Campbell, seven acres.	May 22, 1878,
Thomas Campbell paid judgments on James & McClintock mortgages, $6,000.	June 7, 1878.
Thos. Campbell intervened as deft. in Jane Bryar's bill in equity. Dist. Court U. S.	August 15, 1878.
Thomas Campbell obtained possession of the seven acres.	October 5, 1878.
Decree of District Court U. S. on Mrs. Bryar's bill in equity for plff., directing Thomas Campbell to execute deed to her.	Filed June 26, 1879.

Petition of Thos. Campbell to Judge McKennan for appeal. Circuit Court U. S.	Filed June 28, 1879.
Thomas Campbell issues Lev. Fa. vs. James Bryar, Com. Pleas Ally. Co., Pa., on E. R. James' mortgage judgment.	August 15, 1879.
Circuit Court U. S. appeal of Thos. Campbell from District Court judgment.	Filed Aug. 30, 1879.
E. R. James vs. James Bryar, Com. Pleas Ally. Co., Pa. Shff's. sale of seven acres to Thos. Campbell.	Sept. 7, 1879.
Campbell's use vs. James Bryar, Com. Pleas Ally. Co., Pa., Shff's. deed to Thomas Campbell for 7 acres.	Sept. 20, 1879.
Jane Bryar vs. Thomas Campbell, Com. Pleas No. 1, Ally. Co., Pa. Ejectment for one-half of 7 acres.	Jany. , 1880.
Jane Bryar vs. Thomas Campbell, verdict in ejectment for deft. Com. Pleas. Ally. Co., Pa.	May 19, 1881.
Judgment on verdict.	June 10, 1881.
Judgt. affirmed by Supreme Court of Penn'a.	Nov. 14, 1881.
Jane Bryar died.	August 28, 1890.
Jane Bryar's Heirs substituted in the U. S. Circuit Court.	January 27, 1896.

Circuit Court U. S. Motion of Jane Bryar's Heirs to dismiss defts. appeal of June 28, 1879, as deserted. Motion refused.	January 28, 1896.
Circuit Court U. S. Jane Bryar's Heirs vs. Thos. Campbell. Deft. allowed to perfect appeal and take further testimony.	January 28, 1896.
Circuit Court, U. S. Decree reversing judgment of District Court of June 26, 1879.	February 5, 1897.
Circuit Court, U. S. Jane Bryar's heirs appeal to Circuit Court of Appeals, Third Circuit.	August 5, 1897.
Circuit Court of Appeals. Decree affirming decree of Circuit Court.	December 6, 1898.
Supreme Court of the United States. Jane Bryar's heirs' appeal allowed.	January 20, 1899.

ASSIGNMENTS OF ERROR.

The said United States Circuit Court of Appeals, Third Circuit, erred as follows, viz:

1. In finding as a fact as follows:

"Subsequently (June 29, '78) Campbell was brought in as a defendant."

2. In the first conclusion of law, as follows:

"First the suit at law must be treated as an abandonment of the proceeding in equity."

3. In the second conclusion of law as follows:

"Second (if not) the verdict of the jury must be regarded as a conclusive finding of the facts, in which plaintiffs case rests, against her."

4. The court erred in affirming motion and order of the Circuit Court of January 28th, 1896, to wit:

"And now December ——, 1895, it appearing to the court that an appeal was duly allowed from the decree of the District Court of the United States for the Western District of Pennsylvania, made the 26th day of June, A. D. 1879, to this court on the 30th day of August A. D. 1879, and docketed in this court at the above number and term, and it further appearing that said appellants have failed to bring up the record from the said District Court, pay the entry costs in this court or to prosecute their appeal to the next term of this court. It is on motion of L. C. Barton, solicitor for appellee, decreed that said appeal is hereby declared deserted, and the decree of the said District Court is hereby affirmed at costs of appellants."

5. The court erred in affirming the decree of the Circuit Court in making order of 28th January, 1896, to wit :

"And now 28th January, 1896, on due consideration, it is ordered that the motion to dismiss the appeal be denied, and it is further ordered that the appellant have leave to perfect the appeal and to take further testimony."

6. The court erred in affirming decree of the Circuit Court of February 5th, 1897, which decree is as follows, to wit :

"This cause having come on for final hearing upon the proofs, pleadings and written stipulation, was argued by counsel. And now February 5th, 1897, upon consideration the decree of the District Court is reversed; the costs of that court, however, to be paid by Thomas Campbell. And it is further ordered, adjudged and decreed that the bill of complaint be and the same is dismissed without costs in this court."

7. The court erred in not affirming the decree of the District Court, filed June 26th, 1889, which decree is as follows, to wit:

"This cause came on to be heard on the pleadings and evidence, and was argued by counsel for defendants as well as for complainant, and thereupon, and upon consideration thereof, the court doth adjudge and declare Jane Bryar to be the equitable owner of the land in suit, and that Thos. Campbell received a conveyance thereof and does now hold the same with notice of and subject to the right of Jane Bryar therein; and it is ordered and decreed that the said Thos. Campbell do, by good and sufficient deed or deeds, convey to Jane Bryar, or to whom she shall appoint, the one undivided half part of that tract of land situate in the Twenty-first ward of the city of Pittsburgh, bounded and described as follows: beginning at a wild cherry tree; thence north fifteen and three-quarter degrees east (N. 15¾ E.), twenty-nine perches (29 P.) to a post; thence south seventy-seven and one-half degrees east (77½ E.), twenty-five and two-tenths perches to a post (25.2 P.); thence south four degrees west (S. 4 W.), forty-nine and four-tenths perches (49.4 P.) to a post; thence north forty-seven degrees west (N. 47 W.), thirty-nine and three-

tenth perches (39.3 P.) to the place of beginning; free from all encumbrances done by him or any person or persons claiming by, from or under him; and do account with the said Jane Bryar for all the rents and profits which the said Thomas Campbell has or might without willful default have received from said land, less a just allowance for taxes and repairs on same; and that each party do pay his or her own costs incurred in this procoeding."

8. The court erred in doubting the jurisdiction of the District Court, as follows:

"Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the Circuit Court had authority to do more than reverse and dismiss the bill for want of such jurisdiction."

ARGUMENT.

It is provided by section 4980, Revised Statutes, title, "*Bankruptcy*":

> "Appeals may be taken from the District to the Circuit Courts in all cases of equity, * * * * * arising under this title, when the debt or damages claimed amount to more than five hundred dollars. * * * *."

And section 4981 reads:

> "No appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the Clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee, or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant, at the time of claiming the same, shall give bond in the manner required in cases of appeal in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs."

The docket entries of the District Court (Record, page 3) show that the decree was entered on June 26th, 1879, and that the appeal to the Circuit Court was not allowed or filed in that court until July 16th, 1879—twenty days after the entry of the appeal, and ten days more than allowed by law —and it further shows that no notice was given to the Clerk of the District Court of the claiming of said appeal, nor was notice of any kind given to the "defeated" party, as required by said Act.

Mr. Justice Miller, in Wood vs. Baily, assignee, 21 *Wall*, 640, says, in relation to the 8th section of the Bankrupt Act (sections 4980 and 4981, Revised Statutes):

> "The language of the statute is very strong and admits of no other interpretation: 'No appeal shall be allowed, *in any case, from the District to the Circuit Court*, unless it is claimed, and notice given to the Clerk, and also to the other party, within ten days after the entry of the decree appealed from.' The failure to give notice to the other party within the ten days, whether claimant or assignee, is equally fatal to the appeal, as the failure to give notice to the clerk that the appeal is claimed."

The word "defeated" * * * should be construed as meaning the "opposite" adverse or successful party. *Ibid.*

It is also provided by the Bankrupt Act, §4982, Revised Statutes.

> "Such appeal shall be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same."

Said appeal was allowed July 16th, 1879, and entered in the Circuit Court on August 30th, 1879, to No. 30 November Term, 1879, the appeal to have been in time, even if claimed in time, should have been entered not later than July 26th, 1879. In *ex. parte.* Woollen 104 *U. S.*, 302.

> "it was judicially determined that section eight of the Bankrupt Act required appeals to be filed during the first term which happened to be in session after the expiration of ten days."

At the time said appeal was filed the May Term, 1879, of the Circuit Court was in session, and continued in session until the 2d Monday in November, 1879, and appeal not having been entered to that term it was fatal.

It was the duty of appellant to have had his appeal entered, heard and determined by that court.

Ex-parte Woollen, *supra.*
Castro vs. U. S., 3 *Wall*, 47.
U. S. vs. Specie, 1 *Woods*, 14.
The Glenmorgan, 2 *Curt*, 236.
Glouster Ins. Co. vs. Younger, *Ibid*, 322.
The "Hollen," 1 *Mason*, 431.
The New England Ins. Co., 3 *Sum*, 495.

The tenth section of said Bankrupt Act (§ 4990 Revised Statutes) provides, "that the justices of the Supreme Court should, subject to the provisions of the act, frame 'general orders,' among other things, for regulating the practice and procedure upon appeals."

Under said act, General Order No. 26, approved April 12th, 1875, provides,

> "Appeals in equity from the District to the Circuit Court, * * * * * shall be regulated by the rules governing appeals in equity in the courts of the United States, * * * *"

The Judiciary Act of 1789 and the additional act of 1803, (§ 631 Revised Statutes,) gives an appeal from all final decrees of a District Court in Equity, where the amount in dispute exceeds fifty dollars, exclusive of costs, and § 632 provides,

> "In case of an appeal, as provided by the preceding section, copies of the proofs and of such entries and papers on file as may be necessary in the hearing of the appeal may be certified to the Appellate Court."

While the language of the Act is "*may* be certified" it cannot but be contended that the same should be construed *shall*, as it was never the intention of the framers of the Act to leave it discretionary with the appellant as to whether the

record should be taken to the appellate court, and the late Chief Justice Chase, in Castro vs. U. S., *supra*, said:

> "The Acts of Congress providing for and regulating appeals have been often under the consideration of this court, and it may now be regarded as settled that in cases where appeals are allowed by the Judiciary Act of 1789 and the additional Act of 1803, the writ of error or the allowance of appeal, together with a copy of the record, and the citation, where a citation is required, must be returned to the next court after the writ is sued out or the appeal allowed, otherwise the writ of error, or appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or a new appeal."

This applies to all appeals, including appeal in this case.

All the authorities are the same. In case of an appeal the transcript must be filed at the next term or it is invalid.

The Virginia vs. West, 19 *How.*, 182.
Ins. Co. vs. Mordeci, 21 *How.*, 195.
Castro vs. U. S., 3 *Wall*, 47.
Edmondson vs. Bloomshire, 7 *Wall*, 306.
The Lucy, 8 *Wall*, 307.

And thus we find on the 28th day of January, 1896, when motion was made to the Circuit Court to dismiss the appeal, that appellant had not complied with the laws and rules regulating appeals in such cases in the following particulars:

1. The appeal was allowed by the *Circuit Court* twenty days after decree of District Court was entered, being ten days more than allowed by law.

2. Appellant had not given notice to the clerk of the District Court of his claiming an appeal within ten days after the entry of decree.

3. Appellant had not given Jane Bryar, the successful party, notice of claiming said appeal within ten days, as required by law.

4. Said appeal was not entered at the term of the Circuit Court which was held within the district next after the expiration of ten days from the time of claiming the same.

5. Appellant had not brought up the record of the District Court to the Circuit Court.

But notwithstanding the gross neglect of appellant, as aforesaid, said Circuit Court (Buffington, D. J.) sixteen years after refused to dismiss said appeal, but allowed the same to be perfected and additional testimony to be taken, and said testimony proposed to be taken was not after-discovered evidence, but such that appellant was cognizant of before entry of the decree in the District Court (see petition to revoke, Record, page 30).

> "The validity of such appeal cannot be restored by a subsequent order of the Circuit Court."
>
> Edmondson vs. Bloomshire, *supra.*
> The Lucy, *supra.*

And this we maintain was error in said court and should have been reversed by the Circuit Court of Appeals (Fourth and Fifth Assignments of Error).

But after the Circuit Court did, contrary to law, proceed to hear and determine said cause, it erred in making the decree of February 5, 1897 (Third Assignment of Error).

The learned judge of the Circuit Court, as shown by his opinion (Record, page 34), reasons that appellants here having brought their action in the State courts after the decree of the District Court was filed and appeal to Circuit Court taken, and the decision there having been against them they were concluded. But we maintain that the State courts had no jurisdiction, and consequently their verdict and judgment

void, the action there not having been brought until January, 1880, and after appellee here had through neglect lost his right to appeal from the District to the Circuit Court and allowed the same to become invalid, and after the next Circuit Court, held after the expiration of ten days from the time of claiming appeal had passed, which in this case was May Term, 1879, and appellee here not having perfected his appeal and had the same heard and determined, the decree of the District Court was in full force, and, in fact, it stood in full force and effect until reversed, and as ruled by the learned judge below in this case.

> "It is well settled that in ejectment upon an equitable title one verdict and judgment are conclusive of the title."
>
> Peterman vs. Hulings, 31 *P. S.*, 432.
>
> Winpenny vs. Winpenny, 92 *P. S.*, 440.

> "This being an established rule of property in Pennsylvania, an equally conclusive effect is to be given to such verdict and judgment in the courts of the United States."
>
> Miles vs. Caldwell, 2 *Wall*, 36.

It cannot be contended but that a decree in equity is the same as a verdict or judgment at law. And so appellants here having gotten one verdict and judgment in the District Court—a court of competent jurisdiction—which verdict or judgment is unreversed and not appealed from; all parties were and are concluded by said judgment.

Forsyth vs. Hammond, 166 *U. S.*, 518.

And consequently it necessarily follows that the action in the State courts, not having been brought until after that decree was entered, its decision was void, the matter being *res judicata.*

The jurisdiction of the District Court attached on the 7th day of May, 1877, as of April 30, 1877, while, as before stated, the action was not brought in the State courts until January, 1880, it was held by this court.

In re. Chetwood, 165 *U. S.*, 443:

> "Where the jurisdiction of a court and the right of plaintiff to prosecute his suit in it, have once attached, the right cannot be arrested or taken away by proceeding in another court."

Also, in R. R. Co. vs. Gomila, 132 *U. S.*, 485:

> "Where a State and Federal court have concurrent jurisdiction over the same subject matter, the court which first obtains jurisdiction will retain it to the end of the controversy."

To the same effect is:

Wallace vs. McConnell, 13 *Pet.*, 136.

Taylor vs. Tauter, 16 *Wall.*, 366–370.

And before jurisdiction could attach in the State courts the action in the District Court should have been discontinued and the same could not have been done without leave of court, and that was not done in this case, and surely the plaintiff could not by any action of his—such as bringing his action in the State courts—oust the jurisdiction of the Circuit and District Courts without the consent of those courts.

This case presents the spectacle of two courts deciding the same question between the same parties in different ways. The second decision made by the Common Pleas, in the ejectment, was made while the same question was pending in the United States courts. It was an invasion of the jurisdiction of the United States District Court, and therefore is a void judgment. The authorities are numerous and uniform to this effect.

"A court of co-ordinate jurisdiction is without power to act in a matter pending in the other court."

Maclean vs. Speed, 52 *Mich.*, 257.

"A court must ascertain that it has jurisdiction, before proceeding in a cause, notwithstanding that the parties are willing to concede the jurisdiction."

1876, Phillips vs. 11 *Nev.*, 187.

Why, therefore, did not the Common Pleas stop, when the record of the United States District Court was produced in evidence in the ejectment suit, and decline to enter any judgment whatever?

"A court is bound to inquire, in every case, whether the facts in the case give jurisdiction, although the point is not presented by counsel."

Stamps vs. Newton, 4 *Miss.*, (3 *How.*), 34.

"A court once obtaining jurisdiction of the parties and subject matter has the right to decide every question arising in the cause; and such decision is binding until reversed."

Evans vs. Percifull, 5 *Ark.*, 424.

"If a State and federal court have concurrent jurisdiction of the subject matter of a suit, the court in which legal proceedings are first instituted acquires jurisdiction to the exclusion of the other court."

Parks vs. Wilcox, 6 *Col.*, 489.

1 *Freeman on Judgments* (4th Ed.) page 181, §118.

Jane Bryar could not give the Common Pleas jurisdiction of her ejectment by issuing a writ there. Jurisdiction of the subject matter of a cause is not within the power of the parties to give, however the rule may be as to jurisdiction of parties.

The decision of the Common Pleas is based on the subrogation of Thomas Campbell to some supposed rights of Edward R. James. Campbell never was, and was not entitled to be, subrogated to the rights of James, nor to be invested with them.

> "Subrogation is a doctrine primarily of equity jurisprudence, although its principles have often, and of late years with increasing frequency, been applied in courts of common law, especially in those States in which equitable remedies are administered through the forms of law. It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditor in relation to the debt. The subject is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the *creature of equity*, and is so administered *as to secure real and essential justice* without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but is not to be applied in favor of one who has, *officiously* and as a *mere volunteer*, paid the debt for another, *for which neither he* nor *his property* was answerable *and which he was under no obligation to pay;* and *it is not allowed where it would work any injustice to the rights of others.*"
>
> *Sheldon on Subrogation*, § 1, page 1.

Jane Bryar was a creditor of James Bryar equally meritorious with Thomas Campbell; besides having an equitable estate which, if second to James' mortgage rights, was, by no rule of equity, second to Campbell's rights.

> "Subrogation will be applied only in favor of one who has actually performed the obligations of another, and thereby entitled himself to the rights and advantages incident to the discharge of such obligations. *No such merit can be attached to the mere extinguishment of another's right* by legal means. Consequently, a prior mortgage acquires no right, by the foreclosure of his mortgage, to redeem from an incumbrance subsequent to his own."
>
> *Ibid*, page 3, § 3.

The court cannot allow itself to be used "as a club to beat a dog"—nor as a means of destroying Jane Bryar's equitable estate for the advantage of Thomas Campbell.

> "Subrogation is a mode of equitable relief. The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a *meritorious* creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. The equitable remedy is allowed *only* when it does not conflict with the legal or equitable rights of other creditors of the common debtor. The principle is one of equity merely, and will be carried out in the exercise of a proper discretion, *with a due regard to the legal and equitable rights of others.* The claimant who asks this equity must be governed by the common maxim, 'Sic utere tuo ut alienum non hedas.' Being a doctrine of mere equity and benevolence, it will never be enforced at the expense of a legal right. Thus, where the claim of a surety for money paid by him on a judgment against his principal *has been defeated at law* (the converse of this very case) the surety cannot in equity be substituted to the rights of the creditor in the original judgment, as would otherwise be the case."
>
> *Ib.*, §4, pages 4–5.

> "Legal subrogation, or subrogation by operation by law, takes place *only* for the benefit of one who, being himself a creditor, pays another creditor whose

claim is preferable to his own by reason of privileges or mortgages."

Sheldon on Sub., §5, pp. 5–6.

"The true principle, I apprehend, is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best *serve the purposes of justice* and the just intent of the parties.

"Many cases state the rule in equity to be that the incumbrance shall be kept on foot or considered extinguished or merged, according *to the intent or the interest of the party paying the money;* but the decisions themselves, it is believed, will generally be found in accordance with the principle above stated."

Sheldon on Sub., pp. 15–16, § 12.

"The doctrine of subrogation," said Mr. Chancellor Johnson, "is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in a condition in which they were at liberty *to elect* whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied.

"If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty."

Sheldon on Sub., p. 278, §240.

"The voluntary payment of a debt by a stranger extinguishes it.

"Subrogation by operation of law exists in favor, not of all who pay the debt of another, but only in favor of those who, *being bound for it*, have therefore discharged it.

"The demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such a third person, is absolutely ex-

> tinguished by the payment. It is a well-settled general rule that no one can be allowed to obtrude himself upon another as his surety."
>
> *Ib.*, p. 279, §241.

If his Honor Judge Acheson had power to reverse a judgment of the District Court, sixteen years after the appellant had deserted his appeal from that judgment; and if the Court of Common Pleas of Allegheny county had power to assume control of a litigated cause and to render a valid judgment therein four years after that cause had come upon the records of the United States District Court, and while it was still pending there; the merits of Jane Bryar's cause still remain with her heirs, and the appellant respectfully submits that this court would render justice by reversing the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court of the Western District of Pennsylvania, thus leaving the judgment of the District Court to stand forever; because Jane Bryar was, being a defrauded *cestui que trust.*, a more meritorious *creditor* of James Bryar than Thomas Campbell was (Garnes vs. Bank, 151 *U. S.*, 420), and because the Common Pleas exerted its equity powers in favor of the wrong party, destroying Jane Bryar's equitable title, working great injustice to her for the benefit of Thomas Campbell without justification, without fault of Jane Bryar, and in direct opposition to the unimpeachable decree of the District Court of the Western District of Pennsylvania, sustaining her title and adjudging Campbell to be a *mala fide* claimant of it.

The evidence of the plaintiff was clear, ample and sufficient to establish that she bought from S. B. McElroy the property in dispute and paid the consideration or purchase money with her own separate estate, and that the deed from S. B. McElroy was, by mistake, oversight or otherwise, made

to James Bryar (her husband) instead of to her. These facts clearly establish a resulting trust in Jane Bryar.

> "A trust results in favor of a wife where her husband purchases land with her separate estate, taking a deed in his own name."
>
> Stickney vs. Stickney, 131 *U. S.*, 227.
>
> Lloyd vs. Woods, 176 *P. S.*, 63.
>
> Hay vs. Martin, 14 *Atlantic*, 333.
>
> Hay vs. Martin, 13 *Central*, 217.
>
> Heath vs. Slocum, 115 *P. S.*, 549.
>
> Rupp's Appeal, 100 *P. S.*, 537.
>
> Henderson vs. McClay, 5 *Central*, 225.
>
> Krauth vs. Wheele, 18 *Atlantic*, 351.
>
> Brooks vs. Fowler, 9 *Southeastern*, 1089.
>
> Evans vs. Wahan, 11 *Southwestern*, 230.

Where a husband invests his wife's money and takes the title in himself, without his wife's consent, she has a resulting trust in the land, which she can assert at any time she sees proper to enforce it:

> Light vs. Zoller, 144 *P. S.*, 570–582.
>
> "A resulting trust arises where an estate has been purchased in the name of one person and the purchase money or consideration has proceeded from another. In this case the presumption of law is that the party paying for the estate intended it for his own benefit, and the nominal purchaser is a mere trustee."
>
> *Brightly's Equity Jurisdiction*, page 339, section 412.
>
> Lynch vs. Cox, 7 *Harris*, 265.
>
> German vs. Gabbald, 3 *Binney*, 305.
>
> Wallace vs. Duffield, 2 *S. & R.*, 529.
>
> Kisler vs. Kisler, 2 *Watts*, 324.
>
> Robertson vs. Robertson, 9 *Watts*, 35.
>
> Barnet vs. Dougherty, 8 *Casey*, 371.

"It is the law that where one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a resulting trust arises in favor of him who paid the purchase money, and the nominal grantee holds the land as trustee of the real purchaser."

Brightly's Equity, supra.
Cox vs. Grant, 1 *Yeates*, 164.
Folger vs. Eary, 2 *Yeates*, 119.
Strimpler vs. Roberts, 61 *Harris*, 295.
Galbraith vs. Galbraith, 190 *P. S.*, 225.

And as trusts of this kind are expressly exempted from the statutes of frauds, it is competent for the real purchaser to prove the payment of the purchase money by parol evidence, though it be otherwise expressed in the deed.

Brightly's Equity, sec. 413–4.
Adams' Equity, sec. 33–4.
Jackman vs. Ringland, 4 *W. & S.*, 150.
Staymaker vs. St. John, 5 *Watts*, 30.
Lloyd vs. Cater, 5 *Harris*, 221.
Blyholder vs. Gibson, 6 *Harris*, 137.
Stumpfler vs. Roberts, 6 *Harris*, 295.

Jane Bryar being in possession before and at the time she purchased and continued in possession continuously from that time till September, 1878, when she was ousted by order of court, (appendix, page 36,) and being in possession at the time this suit was brought, her right to recover is not barred by the Act of 1856. See appendix, page 25.

"A case is not within the Act of 1856 relating to resulting trust, when the *cestui que trust.* has possession while the statute is running. If the statute had begun to run, this would stop it; if possession

had preceded the trust relation, it would not begin to run."

Clark vs. Trindle, 2 *Smith*, 492.

Webster vs. Webster, 3 *Smith*, 161.

Willard vs. Willard, 6 *Smith*, 119.

Douglas vs. Lucas, 13 *Smith*, 11.

"The limitation of the Act of April 22, 1856, *P. L.*, 533, as to the time in which a resulting trust must be asserted, does not run against a married woman."

Blanks Estate, 18 *W. N. C.*, 455.

Miller vs. Becker, 160 *P. S.*, 172.

Miller vs. Becker, 166 *P. S.*, 414.

At the time James Bryar was forced into bankruptcy the fee to the undivided one-half of said seven acres was in him, and to the other undivided one-half he held title as trustee for his wife, Jane Bryar; and when Campbell purchased at assignee's sale he took no more than Bryar had, and stood in the same relation to Jane Bryar that James Bryar did. Now, what notice had Campbell of the claim of Jane Bryar to this property? He was aware of the filing of this bill at the time of his purchase, or ought to have been.

"*Lis pendens* is notice to all the world as to the subject matter of the writ."

Diamond vs. Lawrence Co., 1 *Wright*, 353.

Walker vs. Butz, 1 *Yeates*, 574.

Fessler's Appeal, 25 *Smith*, 483.

Snively vs. Hitchen, 9 *Smith*, 49.

Campbell's own testimony shows (page 23, Record) that in the year 1875 he was negotiating a mortgage for $25,000 with James Bryar on the land in dispute, and he testifies (page 25, Record) as follows, viz.:

> "At the time of the negotiation of this mortgage there had been some talk of Mrs. Bryar owning this property." "The seven acre tract?" "Can't say who told me, but some one, I think, told me."

So, away back in 1875 Campbell had notice of Mrs. Bryar's title.

> "One who acquires the legal title to land, with actual knowledge of an existing equitable title, is a trustee of the legal title, holding it for the benefit of the equitable title."
>
> Bailey vs. Wrin, 12 *Southwestern R.*, 1045.
>
> Rainage vs. Paine, 27 *Supreme Court R.*, 39.
>
> Haack vs. Werckin, 23 *Northeastern R.*, 133.

A purchaser of trust property with notice is considered in equity a trustee for the beneficial owner:

Walsh vs. Steele, 2 *Chest*, 427.

But Campbell so being the trustee of said property for Mrs. Bryar, not regarding the rights of his *cestui que trust.*, but in order, as he supposed, to benefit himself, buys in the two judgments against James Bryar on the two mortgages and proceeds and sells the property of his *cestui que trust.* at sheriff's sale and buys it in. It is true that it is done through a third person, but Campbell furnished the money and the property was purchased for Campbell, and afterwards a deed made to him for it as admitted.

See Record, page 33.

A purchase by trustee, through a third person, of property of his *cestui que trast.* is void, though the sale was at public auction.

Michond vs. Gerod, *et al*, 4 *How.*, 530.

A trustee cannot purchase an outstanding title or encumbrance on the trust estate, but he holds it for the benefit of his *cestui que trust.*

Gilman vs. Healy, 7 *N. Y. S. Reporter*, 643.

If a trustee traffics for his own profit in property held by him in trust, the beneficiary may claim the property as his.

Hughes vs. Hughes, 6 *Southern R.*, 353.

A trustee who purchases trust property at sheriff's sale, any profit or benefit resulting from such purchase belongs to his *cestui que trust.*

Mullen vs. Doyle, 47 *L. I.*, 48.

Ricket's Appeal, 21 *W. N. C.*, 229.

The office of trustee is important to the community at large. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit.

R. R. Co. vs. Durrant, 95 *U. S.*, 479.

Purchasers at sheriff' sale under a judgment against the husband with notice of the wife's equity take no title as against the wife.

Miller vs. Beker, 160 *P. S.*, 172.

A trustee cannot claim adversely to those for whom he acquired and holds the property.

R. R. Co. vs. Durrant, 95 *U. S.*, 576.

Section 5053 Revised Statutes U. S., page 982 provides:

> "No property held by the bankrupt in trust shall pass by the assignment."

Having already shown that James Bryar, the bankrupt, at and before his bankruptcy, held the land in dispute in trust for the appellant, the conveyance by the register to the as-

signee passed said bankrupt's interest in the same, seven acres, nothing more, and did not affect the appellant's interest in the same, and that is all the assignee could sell.

Under the English statutes he (the assignee in bankruptcy) notoriously succeeds to no more than the estate and effect of the bankrupt, burdened with their former equities and encumbrances.

> "The assignee in bankruptcy does not occupy the position of a *bona fide* purchaser without notice."
>
> Twelves vs. Williams, 3 *Wharton*, 485.
> Cowder vs. Pleasants, 9 *Barr*, 59.
> Galbraith vs. Fisher, 10 *Harris*, 406.

At the time Campbell purchased at assignee's sale, by the terms and conditions thereof, he bought subject to the payment of the first mortgages, being the McClintock and James mortgages. The assignee, under the order of said court, sold the land subject to the payment of said mortgages, as he was empowered to do under section 5066 of the Bankrupt Act. Could language be plainer than that set forth in deed to Campbell, Appendix, page 34, lines 17 ff.

> "and did then and there sell the same, *subject only to the payment of said mortgages*, to Thomas Campbell for the sum of three thousand five hundred dollars."

When Campbell paid off the mortgages their liens on the land thereby became extinct and a sale thereon by the sheriff would be void.

> "If the plaintiff in a judgment became the owner of the land upon which that judgment is a lien, the lien thereby becomes extinct by operation of law, and no subsequent sale of the land by the sheriff upon that judgment will vest a title in the purchaser."
>
> Koon vs. Hartman, 7 *Watts*, 20.
> Wright vs. Knepper, 1 *Barr*, 361.

"Where one purchases at sheriff's sale a property subject to a mortgage, and subsequently pays off the mortgage, it is an extinguishment of the debt, and he cannot take an assignment of it and enforce it against the mortgagor. The mortgage, in such a case, is part of his bid."

Dollar Sav. Bank vs. Burns, 6 *Norris*, 491.

Hansell vs. Luty, 8 *Harris*, 284.

We are willing to concede a mortgagee is a purchaser within the protection of the recording acts, and as such takes the estate freed from any existing secret equity of which he has not had notice, actual or constructive. And we may further concede that the mortgagees of James Bryar in this case had no notice, either actual or constructive, of the equitable title of Jane Bryar in the land further than possession by her and her husband would be constructive notice. Admitting, then, that these mortgages were protected under the recording acts against the equitable estate of Jane Bryar, of which they had not notice, how can the defendant, Thomas Campbell, take advantage of their protection, he having bought the land at assignee's sale, with notice, both actual and constructive, of Jane Bryar's equitable interest in the same, the bill in this case having been filed before his purchase, and expressly subject to the payment of said mortgages. He knew the only interest the assignee could sell and convey was the interest of James Bryar, which consisted of an individual half, and he was willing to bid and give for that interest $3,500 and pay off the aforesaid mortgages, which then aggregated $6,000. In other words, he he was willing to give $9,500 for James Bryar's undivided half in said seven acres. He having thus purchased the land he had no equity to protect that would justify him in using said mortgages to destroy and vest in himself the trust estate of Jane Bryar. The paying off of the mortgages was only a compliance with his

bid, and when paid by him they were extinguished and a sale on either of them would be void. He got what he bought, and for the price he agreed to pay. He had no right to complain because his purchase resulted in freeing the trust estate from the liens or encumbrances of the mortgages. He agreed to do that when he bought, expressly subject to their payment, and knew, too, that he was buying only an undivided half of the land, to wit: the bankrupt's interest therein. That interest was worth, at the time of the assignee's sale, taking Campbell's testimony (page 24, Record), from five to eight thousand dollars per acre, or at least $17,500.

The evidence further shows, page 33 Record, that Mrs. Bryar offered to pay the half of the amount of said judgments on said mortgages before the sheriff's sale but was not allowed to do so.

It was suggested on the trial of the case in the Court of Common Pleas No. 1, that plaintiff is estopped by having, with her husband, executed deeds to various persons for portions of the land sued for.

The defendant was not, nor could not be misled or injuriously affected by the description in those deeds executed many years before the defendant became interested in the land.

> "An estoppel can only be pleaded by one who was diversely affected by the Act which constitutes it."
>
> Cuttle vs. Brockway, 8 *Casey*, 50.

> "Where a husband purchases property with his wife's money and takes title in his own name there is a resulting trust in her favor. That she joined in a deed of a portion of the land does not estop her from setting up such a trust as to the balance."
>
> Hay vs. Martin, 14 *Atlantic*, 333.
>
> Hay vs. Martin, 13 *Central*, 217.

The learned Judge of the Court of Appeals, (Butler) in the opinion of the court, says (Record page 39):

"Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least.")

The learned judge is the first to raise the question of the jurisdiction of the District Court. This is a suit against an assignee in bankruptcy brought by a person claiming an adverse interest in the property transferred to such assignee, and Thomas Campbell was made a party to the action on August 15, 1878, not June 29, 1878, upon his own petition and of his own motion, admitting the jurisdiction of said court and placing himself thereunder.

"Under section 4979 Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy brought by any person claiming an adverse interest touching any property or rights of property transferred to or vested in such assignee."

Burbank vs. Bigelow *et al.*, 92 *U. S.*, 179.

"The original jurisdiction is conferred upon the Circuit Court concurrent with the District Court of the same district, in all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee, touching any property of said bankrupt transferred to or vested in such assignee."

Shearman vs. Bingham *et al.*, 7 *Bank Reg.*, 490.
Lathrop Assignee vs. Drake *et al.*, 91 *U. S.*, 516.
Adams vs. Collier, 122 *U. S.*, 382.

"A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the Court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion."

Barry vs. Edmunds, 116 *U. S.*, 550.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellants.

APPENDIX.

ASSIGNEE'S DEED TO THOMAS CAMPBELL,

Made the twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-eight, between Robert Arthurs, assignee in bankruptcy, and James Bryar, of the city of Pittsburgh, county of Allegheny, State of Pennsylvania, of the first part, and Thomas Campbell, of the same place, of the second part. Witnesseth, that whereas the said James Bryar, in the District Court of the United States, for the Western District of Pennsylvania, at No. 2742 in said court, was adjudged a bankrupt, and the said Robert Arthurs duly elected and confirmed assignee; and the said bankrupt was, at the time, seized of the following described real estate, viz: All that certain piece of land situate now in the Twenty-first ward in the city of Pittsburgh, county of Allegheny, State of Pennsylvania, bounded and described as follows, to wit: Beginning at a cherry stump, about two hundred and thirty feet from the Pennsylvania Railroad, and near the western line of Fifth avenue; thence along the line of land owned by Julius Voetter and others N. 14° 49′ E. to a point one hundred and thirty-one feet six inches from Frankstown avenue; thence S. 62° 09′ E. at right angles with Fifth avenue to the centre of the same; thence by the centre line of Fifth avenue N. 27° 50½′ E. to the centre of Frankstown avenue; thence by the centre line of Frankstown avenue S. 78° 25′ E. fourteen and $\frac{54}{100}$ perches, more or less, to a monument stone in said avenue; thence by the same centre line S. 79° 58½′ E. twenty-nine $\frac{18}{100}$ feet; thence S. 3° 38′ W., fifty and nine-tenths perches to the line of property now owned by the Liberty Improvement Bank; thence by the same N. 47° 02′ W., thirty-nine $\frac{15}{100}$ to the place of beginning, containing about seven acres, more or less, upon which are erected a large brick house and several outbuildings, also a tenant house and barn.

And whereas, upon the said petition of the said Robert Arthurs, assignee, the said court did, on the 19th day of May, A. D. 1877, order and direct the sale of said real estate divested of all liens, and subsequently, to wit, on the day of A. D. 187 , did order and direct that the same should be sold, divested of all lieus, or subject only to the first mortgages, amounting to about six thousand dollars, as the assignee might deem to the interest of said estate.

And whereas, after due and legal notice by advertisement and otherwise, the assignee did, on the fourth day of May, A. D. 1878, at four o'clock P. M., on the premises, as directed by said court, did expose the said before described piece of land, with the buildings, and subject to the first mortgages, viz: Mortgages of James Bryar to Thos. McClintock, recorded October 2, 1874, in vol. 161, p. 637, and James Bryar to E. P. R. James, recorded October 2, 1874, in vol. 161, p. 640, to public sale, and did then and there sell the same, subject only to the payment of said mortgages, to said Thomas Campbell, for the sum of three thousand five hundred dollars, that being the highest and best price bidden for the same; and on the 6th day of May, 1878, said assignee made return of said sale to said District Court, and which was on May 21, 1878, confirmed absolutely, and the assignee ordered to make and deliver to Thomas Campbell, the purchaser, a deed for the same, as by reference to the records of said court at No. 2,742, in bankruptcy, will more fully appear.

Now this Indenture Witnesseth, That the said Robert Arthurs, assignee of James Bryar, bankrupt, for and in consideration of the sum of thirty-five hundred dollars, lawful money, unto him in hand well and truly paid by said Thomas Campbell, the receipt of which is hereby acknowledged, has granted, bargained, sold and by these presents, (by virtue of and in obedience to the orders of said court,) doth grant, sell, enfeoff, release and confirm unto the said Thomas Campbell, his heirs and assigns, all the right, title and interest of the said Robert Arthurs, assignee of said James Bryar, bankrupt, of in and to all the before described tract of land, with the reservations, and subject to the first mortgage as aforesaid, with the appurtenances, together with all and singular, the

rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property claim or demand whatsoever of the said Robert Arthurs or of the said James Bryar, of, in, to or out of the same: *To have and to hold* the said described tract of land, with the buildings and reservations, the hereditaments and premises hereby granted, or intended so to be, with the appurtenances, unto the said Thomas Campbell, his heirs and assigns, to the only proper use and behoof of the said Thomas Campbell, his heirs and assigns forever.

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in presence of GEO. I. WHITNEY. } ROBERT ARTHURS, [SEAL] *Assignee of James Bryar.*

Received as of the day of the date of the above indenture of the above named Thos. Campbell three thousand and five hundred dollars, the consideration money above mentioned in full. ROBERT ARTHURS, *Assignee.*

In the matter of the Bankruptcy of James Bryar. } Western District of Pennsylvania, No. 2742.

PETITION—Filed August 23rd, 1878.

To the Honorable the Judges of the District Court of the United States, Western District of Pennsylvania.

The petition of Thomas Campbell respectfully shows, etc.: That on the 8th day of January, 1877, James Bryar of the city of Pittsburgh in said district was duly adjudged a bankrupt by this court and Robert Arthurs was afterwards chosen assignee, which choice was afterwards duly approved; that by the assignment to Robert Arthurs of the estate pursuant to

Sec. 5,044 of the Revised Statutes there vested in said assignee the title of said bankrupt of and in (*inter alia*) certain real estate consisting of about seven acres in 21st ward, Pittsburgh, of which said bankrupt was then seized and claimed to be seized in fee simple and in severalty on which was erected the said bankrupt's dwelling house. That on the 4th day of May, 1878, pursuant to the order of this Honorable Court the said assignee sold at public auction to your petitioner the said real estate, which sale upon report thereof made, was confirmed by your honors on the 21st day of said month and the assignee ordered to make and deliver to your petitioner a deed for the same, which was done on the 22nd day of said month. That possession of said real estate was never delivered to the assignee but the said bankrupt continued in possession thereof although requested to deliver up the same to said assignee. That said bankrupt was in possession as aforesaid at the time of the sale and delivery of the deed to your petitioner and is still in possession of the greater part thereof, including said dwelling house, and although notified on the 6th day of August, 1878, to deliver up possession within ten days still remains in possession.

That since the adjudication of James Bryar, his wife, Jane Bryar, set up a claim to the undivided one-half of said real estate, and in conjunction with her husband remains in possession and refuses to deliver up possession to your petitioner, although it is her duty to do so under the law and order of sale. Wherefore your petitioner prays that an order be made commanding said James Bryar to deliver up possession of said real estate to him.

[Signed.] JAMES CAMPBELL.

Affidavit made August 23, 1878.

ORDER OF COURT.

"And now, August 23, 1878, a rule is granted on said James Bryar and Jane Bryar, his wife, to show cause why an order should not be made as prayed for. Returnable August 29, 1878."

Answer filed August 29, 1878, admitting sale of bankrupt's interest, but claiming title through S. B. McElroy to the undivided one-half of the said seven acres of land.

ORDER OF COURT.

"Now, August 29, 1878—argued C. A. V. Now, October 1st, 1878, rule absolute, without prejudice to any claim of title of Mrs. Bryar, wife of James Bryar."

PETITION OF EDWARD JAMES.

In the District Court of the United States, for the Western District of Pennsylvania.

In the matter of James Bryar, Bankrupt. } No. 2742, in Bankruptcy.

To the Honorable W. W. Ketcham, Judge of said Court.

The petition of Edward R. James of the city of Pittsburgh respectfully represents:

That he is a creditor of the said James Bryar by a certain mortgage dated October 1, 1874, and recorded October 2, 1874, in Mortgage Book, vol. 161, page 640, upon a certain tract of land in the 21st ward of the city of Pittsburgh, containing seven acres, particularly described in said mortgage; for the debt or sum of two thousand dollars ($2000.00) which with interest thereon from August 1, 1876, became due on the first day of October, 1876, and remains wholly unpaid.

Said mortgage is further conditioned that in case default should be made in the payment thereof for the period of sixty days, a writ of *scire facias* may at once be issued thereon and prosecuted to judgment and execution for the whole amount of said debt and interest, together with all fees, costs and expenses, &c., including an attorney's commission of five per centum. This mortgage and another of the same date, and recorded at the same time, given by said James Bryar to Thomas McClintock for $3000,00, with interest, etc., are the

first liens on the said seven acre tract, so mortgaged as aforesaid.

Your petitioner is wanting his money due on said mortgage.

Wherefore he prays your Honorable Court to allow him to proceed in the State courts to collect his said mortgage.

And he will ever pray, etc.

EDWARD R. JAMES.

City of Pittsburgh, ss.

Edward R. James, being duly sworn, saith that the facts set forth in his above petition are true, to the best of his knowledge and belief.

EDWARD R. JAMES.

Sworn to and subscribed before me this 29th day of March, 1878.

M. F. CASSIDY,
Alderman.

ORDER.

And now, to wit, March 30, 1878. The within petition presented. Whereupon the Court grants leave to the said Edward R. James to proceed in the State courts to collect his said mortgage.

PER CURIAM.

PORTIONS OF ACT OF 22 APRIL, 1856, P. L. 532.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same*, That no exception in any Act of Assembly respecting the limitation of action in favor of persons *non compotes mentes*, imprisoned, *feme covert*, or minors, shall extend so as to permit any person to maintain any action for the recovery of any lands or tenements after thirty years shall have elapsed since the right of entry thereto accrued, to any person within the exception aforesaid: *Provided*, That

all persons who now have rights unbarred and who would be sooner barred by this section, shall not be thereby barred for five years from the date hereof.

SEC. 6. That no right of entry shall accrue or action be maintained for a specific performance of any contract for the sale of real estate, or for damages for non-compliance with any such contract, or to enforce any equity of redemption after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right of entry, unless such contract shall give a longer time for its performance, or such contract, equity of redemption or trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the said perrod, *Provided*, That as to any one effected with a trust by reason of his fraud, the said limitation shall begin to run only from the discovery thereof or when by reasonable diligence the party defrauded might have discovered the same; but no *bona fide* purchaser from him shall be affected thereby or deprived of the protection of the said limitation. *And, provided*, That any person who would be sooner barred by this section shall not be thereby barred for two years from the date hereof.

No. 227.
Sup. Ct. Campbell v. Barton
Q99

Office Supreme Court U.S.
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JAMES H. McKENNEY,
CLERK

SUPPLEMENTAL BRIEF EX-PARTE APPELLANTS.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 19, 1900.

NO. 227.

JAMES BRYAR, JR., EMMA S. BRYAR, SAMUEL B. BRYAR, EDWARD S. BRYAR, JENNIE H. BRYAR, HATTIE S. BRYAR and SUSAN BRYAR, Heirs-at Law of Jane Bryar, Deceased,

Appellants,

VERSUS

THOMAS CAMPBELL,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit. No. March T. 1898.

Opinion by Butler, J.

Appeal by Plaintiffs from the Circ. Court West. Dist. of Pennsylvania. No. 30 Nov. Term 1879.

Opinion by Acheson, J.

Appeal by Defendant from the District Court of the Western Dist. of Pennsylvania. No. 17 May Term 1877.

Opinion by Ketcham, J.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Counsellors for Appellants.

—IN THE—

Supreme Court of the United States,

NO. 227 OCTOBER TERM, 1899.

JAMES BRYAR, Jr., et al., Heirs of JANE BRYAR, deceased, Appellants,

VERSUS

THOMAS CAMPBELL, Appellee.

SUPPLEMENTAL BRIEF EX-PARTE APPELLANTS.

The case of Bryar and wife against Beckett and others, upon which his Honor Judge Acheson based his decision in the Circuit Court below, in which decision Judge Acheson reverses the judgment of Judge Ketcham in the District Court, is reported in the Pittsburgh Legal Journal, Vol. 30, page 12, and is, as follows:

JAMES BRYAR et ux., in Right of the Wife, Plaintiffs Below, v. JOHN W. BECKETT et al.

SUPREME COURT OF PENNSYLVANIA.

Where one purchases land with knowledge of a secret equity in a third person, he may perfect his title by outstanding liens, and the fact that he had knowledge of the equity does not affect his title derived from a sale upon the liens purchased. Upon purchasing such liens he stands in the shoes of the lien creditor.

One who purchases land at an assignee's sale, subject to existing mortgages, is not bound to pay them off unless he expressly or by implication agrees to do so, and may secure his own title by purchasing them and proceeding to perfect his title under them.

Error to the Court of Common Pleas, No. 1, of Allegheny county.

STATEMENT BY THE REPORTER.

This was an action of ejectment brought to recover the undivided half of a lot of seven acres of land in the Twenty-first ward, Pittsburgh. Both parties claim title through James McElroy, who died about 1837, intestate, leaving seven children, of whom Jane Bryar was one. In 1850 proceedings in partition were commenced in the Orphans' Court to divide the real estate of James McElroy. Purpart No. 6, containing seven acres and being the property in dispute, was chosen by John McElroy and allotted to him by the court. Jane Bryar under the partition proceedings was entitled to receive $2,528.73. For this sum Jane Bryar gave a receipt to S. B. McElroy and a release to that amount for the owelty, payable by S. B. McElroy in the partition proceedings. The receipt was given in March, 1852. John McElroy, by deed dated June 10, 1856, conveyed purpart No. 6, the property in dispute, to S. B. McElroy and James Bryar, husband of Jane Bryar, equally, as tenants in common, in fee simple. It appears that S. B. McElroy had not paid his sister wholly in money, the amount for which she had

given a receipt and release, but that the payment had been made partly by a note drawn by Eliza McElroy which was not paid. Finding that his sister Eliza was unable to pay the note, and desiring to secure Jane Bryar, S. B. McElroy suggested that Jane should take his undivided interest in purpart No. 6, in lieu of the note. To this she consented, and through her husband delivered the note of Eliza to S. B. McElroy, who in return executed and delivered a deed for his undivided one-half interest in purpart No. 6; not however, to Jane Bryar, but to her husband James. The surrender of the note was the consideration of the deed, and it is alleged to have been the intention to have had the deed made to Jane Bryar, and that the conveyance to her husband was a mistake. Within a year or so after the conveyance of S. B. McElroy, Bryar informed his wife that the deed had been made to him and was recorded, at which time she desired to have the title in herself, but the correction was never made. In 1874 James Bryar executed two mortgages on the property in dispute, one to Thomas McClintock for $3,900, the other to E. R. James for $2,000, and in 1878 the mortgages were foreclosed and judgment entered.

In January, 1877, James Bryar was adjudged a bankrupt, and the register in bankruptcy conveyed the property in dispute to Robert Arthurs, his assignee. The assignee proceeded to sell the interest of James Bryar in the seven acres in question, subject to the two mortgages heretofore mentioned, and conveyed the property to Thomas Campbell.

Prior to the sale a bill in equity had been filed in the United States District Court for the Western District of Pennsylvania by Jane Bryar, asking the court to restrain

the assignee from exercising control over her interest in the seven acres, of which proceeding Campbell had notice. The bill was afterwards amended. Jane Bryar was in the adjudication upon this bill in equity decreed by the District Court to be the equitable owner of the undivided one-half of the seven acres for which Thomas Campbell had received a conveyance. It was also therein decreed that he held the said one-half subject to the rights of Jane Bryar, and that he execute a deed to her for the said undivided half. This decree was appealed from by Thomas Campbell to the Circuit Court.

Wm. B. Rodgers, as the attorney for Campbell, then purchased the judgments obtained on the mortgages already mentioned, issued execution, sold the seven acres at sheriff's sale and bought the same for $50. The deed was made by the sheriff to Wm. B. Rodgers, who gave a written memorandum to Campbell, stating that he would convey to any one Campbell might wish, when requested so to do.

It was not disputed that Wm. B. Rodgers bought and held in trust for Campbell whatever title he obtained by the sheriff's deed.

The court of common pleas below, charged peremptorily for the defendants.

The position taken by the plaintiffs in error was that the undivided one-half, having been purchased with the money of Jane Bryar and conveyed to her husband by mistake, was held by him in trust for her, and Campbell having had notice of this equity took subject to it, and that the title obtained through the sheriff was void.

For plaintiffs in error, *Messrs. John N. McClowry, S. H. Geyer* and *A. N. Sutton.*

Contra, Messrs. Rodgers & Oliver and *Thomas M. Marshall.*

PER CURIAM. Filed November 14, 1881.

SHARSWOOD, C. J.

The fact that the mortgages of McClintock and James on the premises were valid liens, and the mortgagees entirely unaffected by any notice of the secret equity of Mrs. Bryar was undisputed, and the consequence necessarily followed that whether Campbell had notice or not he stood in their shoes when he purchased the title derived from them. It is contended, however, that Campbell having bought at the assignee's sale, subject to these mortgages, was bound to pay them off, and when he did so they were extinguished. But unless he expressly or by necessary implication agreed to pay them he was not bound to do so, and had an undoubted right to secure his own title by purchasing them and proceeding to perfect his title under them.

Judgment affirmed.

It is respectfully submitted to this court, that the per curiam opinion of the Supreme Court of Pennsylvania as delivered above, is not the law applicable to, and controlling the case before the court. The opinion of Chief Justice Sharswood, expressly says, that "unless he—Campbell—expressly or by necessary implication, agreed to pay them (the mortgages) he was not bound to do so."

The appellant cannot reconcile this decision with the facts of the case as then before the Supreme Court of Pennsylvania, which facts show the express assumption of the James and McClintock mortgages by Thomas Campbell when he accepted the assignee's deed to him.

BANKRUPTCY RECORD.

In the matter of the Bankruptcy of James Bryar } Western District of Pennsylvania, No. 2742.

PETITION.—Filed August 23rd, 1878.

To the Honorable the Judges of the District Court of the United States, Western District of Pennsylvania.

The petition of Thomas Campbell respectfully shows: That on the 8th day of January, 1877, James Bryar of the City of Pittsburg in said district was duly adjudged a bankrupt by this Court and Robert Arthurs was afterwards chosen assignee which choice was afterwards duly approved; That by the assignment to Robert Arthurs of the estate pursuant to Sec. 5044 of the Revised Statues there vested in said assignee the title of said bankrupt of and in (inter alia) certain real estate consist of about seven acres in 21st Ward Pittsburg, of which said bankrupt was then seized and claimed to be seized in fee simple and in severalty on which was erected the said bankrupt's dwelling house. That on the 4th day of May, 1878, pursuant to the order of this Honorable Court the said assignee sold at public auction to your petitioner the said real estate which sale upon report thereof made, was confirmed by your honors on the 21st day of said month and the assignee ordered to make and deliver to your petitioner a deed for the same, which was done on the 22nd day of said month. That possession of said real estate was never delivered to the assignee but the said bankrupt continued in possession thereof although requested to deliver up the same to said assignee. That said bankrupt was in possession as aforesaid at the time of the sale and delivery of

the deed to your petitioner and is still in possession of the greater part thereof including said dwelling house and although notified on the 6th day of August, 1878, to deliver up possession within ten days still remains in possession.

That since the adjudication of the said James Bryar, as a bankrupt, his wife, Jane Bryar, set up a claim to the undivided one-half of said real estate and in conjunction with her husband remains in possession and refuses to deliver up possession to your petitioner although it is her duty to do so under the law and order of sale. Wherefore your petitioner prays that an order be made commanding said James Bryar to deliver up possession of said real estate to him.

[Signed]: THOMAS CAMPBELL.

Affidavit made August 23, 1878.

ORDER OF COURT.

"And now August 23, 1878, a rule is granted on said James Bryar and Jane Bryar, his wife, to show cause why an order should not be made as prayed for. Returnable Aug. 29, 1878."

Answer filed August 29, 1878, admitting sale of bankrupt's interest but claiming title through S. B. McElroy to the undivided one-half of the said seven acres of land.

ORDER OF COURT.

"Now Aug. 29, 1878—Argued C. A. V.—Now Oct. 1st, 1878, Rule absolute without prejudice to any claim of title of Mrs. Bryar, wife of James Bryar."

Simply for the sake of clearness, and grouping together

the facts of the case in a brief space, the opinion of Judge Butler is here reprinted with the insertion therein of some dates and items to which his Honor alludes, but which he does not fully set forth.

CIRCUIT COURT OF APPEALS RECORD.

In the United States Circuit Court of Appeals for the Third Circuit.

JAMES BRYAR, JR., ET. AL., Heirs of Jane Bryar, Deceased, Appellants
vs.
THOMAS CAMPBELL, appellee

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Before Dallas, Butler and Kirkpatrick, JJ.

BUTLER, *District Judge:* Dec. 5th-1898

In January, 1877, James Bryar was declared a bankrupt, and soon thereafter certain land to which he had title was offered for sale by his assignee. His wife, Jane Bryar, thereupon petitioned the District Court (by Bill in Equity) for an order to restrain the sale, averring that the property was hers, the deed for the same having been made to her husband by mistake. While the application was pending viz, May 4th, 1878, the assignee sold the land to Campbell. Subsequently (June 29, '78) Campbell was brought in as a defendant, and later (June, '79) the petition was amended by inserting a prayer for conveyance of the land by Campbell to the petitioner. Thus the proceeding became substantially a suit between Mrs. Bryar and Campbell for the prop-

erty in controversy. Subsequently viz, June 26th, 1879, the court adjudged it to her and decreed that Campbell convey accordingly. July 16, '79, the latter appealed to the Circuit Court. While the appeal was pending viz, Sept. 20th, 1879, the land was sold under a mortgage executed by James Bryar October 2, 1874, and purchased by William B. Rodgers who conveyed to Campbell. In 1880 Mrs. Bryar brought an action of ejectment (in the Commom Pleas of Allegheny county, Penna.) against Campbell, and on the trial a verdict was rendered against her and judgment entered accordingly. January 28, 1896, the plaintiff moved the United States Circuit Court to dismiss the appeal (for imperfection); which motion the court refused. With these facts appearing on the record the appeal came to a hearing in 1897 and the bill was dismissed. The refusal to strike off the appeal and the dismissal of the bill constitute the errors assigned.

The case is extraordinary; but in any view that can be taken of it the action of the Circuit Court (in both respects complained of) must be affirmed. Granting that the District Court had jurisdiction to enter the decree (which may well be doubted, to say the least), and that the Circuit Court had authority to do more than reverse and dismiss the bill, for want of such jurisdiction, its refusal of the motion and dismissal of the bill on the merits must be affirmed, because, first, the suit at law must be treated as an abandonment of the proceeding in equity, and, second (if not), the verdict of the jury must be regarded as a conclusive finding of the facts, on which the plaintiff's case rests, against her.

The decree is therefore affirmed.

No. 227.
Brf. of Campbell & Barton for App'ts.
MAR 10 1900
JAMES H. McKENNEY,
Clerk.

Appellants' Brief of Authorities.

BRYAR'S HEIRS,

Filed Mar. 10, 1900.

APPELLANTS,

vs.

CAMPBELL,

APPELLEE.

Supreme Court of the United States,

OCTOBER TERM, 1899,

NO. 227.

Appeal from the Circuit Court of Appeals, Third Circuit.

EDWARD CAMPBELL,
LOWRIE C. BARTON,
Appellants' Attorneys.

17,317.

—IN THE—

Supreme Court of the United States,

NO. 227 OCTOBER TERM, 1899.

BRYAR'S HEIRS

VS.

CAMPBELL.

BRIEF OF APPELLANTS' AUTHORITIES.

If the Common Pleas ejectment involved the same title so as to be an estoppel to the United States District court litigation, the rule must work both ways and the Common Pleas judgment must be a nullity by reason of want of jurisdiction, the District court having been in exclusive possession of the cause before it was carried to the Common Pleas.

If the Common Pleas judgment did not involve the same title as that litigated in the United States District court, but involved only the James title, which the appellee's counsel now contends, came into existence *after* the United States District court final adjudication, then the Common Pleas decision was not an adjudication of the District court cause of action, and the action of the Circuit court in holding it a bar to the District court suit, was error. No matter how good a title the James title might be, it could not rightfully affect

the District court adjudication; it was not in existence when the District court adjudication was made, and could not be entitled to more effect than an outstanding title never offered in evidence.

If his Honor Judge Acheson, is correct in his conclusion, that the subject-matter of the action of ejectment in the Allegheny county Common Pleas, is identical with the subject-matter now in hearing, so as to come within the rules of *res judicata*, then, because the same matter had been finally adjudicated by the District court of the United States, the Common Pleas judgment is null and void, incapable of ratification, and must be so held and treated, whenever and wherever and for whatever purpose it is sought to be used or relied on as a valid judgment. This is said by the text writers to be a "familiar and universal rule." It has been often recognized and never repudiated by the courts.

1 Black on Judgments, bottom p. 265 § 218.

1 Black on Judgments, bottom p. 291 § 240.

Brown on Jurisdiction, p. 106 § 40 note 1.

1 Freeman on Judgments (4th Ed.) p. 181 § 118 a.

1 Foster Fed. Pr. p. 14 note 15.

1 Foster Fed. Pr. p. 347 note 7.

Covell vs. Heyman 111 U. S. 176—4 Sup. Ct. R. 355.

Heidritter vs. Elizabeth O. Co. 112 U. S. 294–5 Sup. Court Rep. 135–139.

Mansfield Ry. Co. vs. Swan 111 U. S. 379.

St. Louis R. vs. Walthers 134 U. S. 41.

Kansas City & T. R. vs. I. L. Co. 37 Fed. Rep. 3.

Int. C. & I. Co. vs. Gibney 160 U. S. 217.

Borden vs. Fitch 15 Johns, 141.

The decree of the United States District court, in this case, of June 26 1879, adjudging the title to the land in dispute, to be in Jane Bryar, and decreeing that the appellee, Thomas Campbell, execute a deed for the same to her, is, under the foregoing authorities, unassailable, final, and in full force at present, unaffected in any respect, by the "vain, nugatory and void" (Heidritter vs. Elizabeth &c. 112 U. S. 294) procedure of the Court of Common Pleas of Allegheny county, and the Supreme Court of Pennsylvania, in the premises.

"The line which separates error in judgment, from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, and may be declared a nullity *collaterally*, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity, in the other mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."

Herman on Estoppel and Res. Judicata, vol. I page 443, Sec. 380.

Voorhees vs. Bank 10 Peters 449.

"If two courts have concurrent jurisdiction, that which first attaches is exclusive, AND CANNOT BE SUBSEQUENTLY DEFEATED."

Wallace vs. McConnell 13 Pet. 136.

Taylor vs. Carryl 20 Howard 583.

Mallett vs. Dexter 1 Curt. 178.

"The rule, that where the court in which any proceed-

ing is instituted, has no jurisdiction of the subject-matter, the proper course is to dismiss the suit or proceeding, without rendering any judgment, is confined to those cases where the want of jurisdiction appears upon the face of the proceedings."

Gormley vs. McIntosh, 22 Barb. (N. Y.) 271.

"Where it does so appear, and the cause goes to a superior court upon appeal, the want of jurisdiction is equally fatal there, and the superior court will render such judgment as should have been rendered in the court below." Ib.

"Consent may give a court jurisdiction of parties to an action, but not of the subject-matter. Brady vs. Richardson 18 Ind. I, Overstreet vs. Brown 4 McCord (S. C.) 79; Campbell vs. Cowden, Wright (Ohio) 484; Cleveland vs. Welsh, 4 Mass. 593; Harrison vs. Rowan, Pet. C. Ct. 489; Walker vs. Rogan I Wis. 597; Hills vs. Miles. 13 Wis. 625; Clyde &c. Plank Road Co. vs. Parker 22 Barb. (N. Y.) 323.

"It was argued that the court had no jurisdiction to entertain the bill unless there were good judgments, and that no admission or consent could confer jurisdiction—HELD—that the principle as to consent applied only to the question of general jurisdiction to adjudicate as to the subject-matter, and not as to the question whether the particular facts of the case brought it within that conceded general jurisdiction; consent cannot confer jurisdiction *to hear a case*, but if, as made by the complaint, it is one proper for the court to hear, admissions are sufficient ground to influence it in granting or refusing the relief asked."

Wanser vs. Howland, 10 Wis. 8.

"The proceedings of any tribunal, not having jurisdiction of the subject-matter which it professes to decide, are void."

Wickes vs. Caulk, 5 Har. & J. (Md.) 42.

Griffith vs. Frazier, 8 Cranch, 9.

Denn vs. Harnden, 1 Paine, 55.

Collamar vs. Page, 35 Vt. 387.

"After a court has once been vested with jurisdiction of a cause, the sale of the claim to a third party does not operate to divest the jurisdiction." 1870.

Blake vs. Bank of Louisana, 22 La. Ann. 572.

"A court once having acquired jurisdiction of a cause should retain it." 1858.

West vs. Morris, 2 Disney (Ohio) 415.

"The jurisdiction of any court, over either the person or the subject-matter, may be inquired into whenever any right or benefit is claimed under its proceedings." 1865.

Gray vs. Larrimore, 2 Abb. U. S. 542.

Freeman on Judgments, Fourth Ed. Vol. 1, page 181, § 118, a, explains the matter thus: "It may happen that while an action is pending over the subject-matter and parties of which the court has jurisdiction, another action is commenced, to which the same persons are parties, in another court, involving the same subject-matter, and it may further happen that both actions proceed to judgment, and that the judgments are wholly irreconcilable. If so, then the question arises, To which shall be given precedence? The authorities agree that when a court has obtained jurisdiction over an action, it is entitled to pursue such jurisdiction to final judgment, and that, its jurisdiction cannot be divested by the

bringing of another action in a court of current jurisdiction, and that, notwithstanding the bringing of a second action, the court first acquiring jurisdiction will not hesitate to proceed, irrespective of what may be done in the other action by the other court. So far as we are aware, no instance has ever occurred in which the court last acquiring jurisdiction has proceeded to judgment and sought to enforce such judgment notwithstanding the pendency of the prior action. Generally, the conflict of jurisdiction is avoided by suggesting to the second court the fact that another court had previously acquired jurisdiction of the controversy, and that, to avoid any unseemly conflict, the trial of the second action should be stayed until the first is disposed of; and in some instances, parties instituting the second action have been enjoined from its further prosecution. Still, it may happen that when one of the national courts has acquired jurisdiction of an action, one of the parties thereto may thereafter resort to a state court and there commence an action against his adversary, involving the subject-matter, and thus attempt to transfer the controversy to the state courts; and the latter may, notwithstanding any objections made, insist upon proceeding to trial and judgment. In this event will its judgment be valid, or not? This question seemed about to arise in a very celebrated case, (Sharon vs. Sharon 79 California 633) but its decision was finally rendered unnecessary by the reversal of the judgment of the state court. So far as any opinion was expressed upon the subject in this case, the courts of the state of California inclined to the view that their judgment was void, while the national courts, on the other hand, were obviously determined, if necessary, to en-

tirely disregard it. It seems impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties. If either has authority to act, its action *must necessarily be exclusive*, and therefore it is our judgment that whenever either the state or the national courts acquire jurisdiction of an action and the parties thereto, this jurisdiction cannot be destroyed, diminished, or suspended by one of the parties bringing an action in another court, and that any judgment or order of the latter court *is void*, so far as it conflicts with any judgment or order of the court first acquiring jurisdiction."

In Green vs. Rick 121 Pa. page 130, Mr. Justice Clark says, page 140–141, as follows:

"The whole doctrine of *lis pendens*, in this country, is said to be founded upon the opinion of Chancellor Kent in Murry vs. Ballou, 1 Johns Ch. 566: "The established rule, says the chancellor, is that a lis pendens, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree, and the lis pendens begins from the service of the subpoena after the bill is filed. Where a purchase is made of property actually in litigation, pendente lite, upon a valuable consideration, and without express or implied notice, in point of fact, the purchaser is affected in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit: Story's Eq. J. §405. The principle applies generally, in suits brought in law or equity for the purpose of determining the title to real property: Hersey vs. Turbett 27 Pa. 418; but it is not confined to actions involving title

to realty. It is applicable in certain cases involving the title to choses in action, excepting commercial paper not due. In Diamond vs. Lawrence Co., 37 Pa. 353, it is held, that the pendency of a suit between a county and a railroad company, in regard to bonds issued by the county in payment of its subscription to the stock of the company, is notice to all the world of the facts alleged in the pleadings therein. Also, in Murry vs. Lylburn, 2 Johns. Ch. 441, the principle was held to apply to choses in action, as well as to real estate, and to entitle a cestui que trust, whose land has been fraudulently disposed of by the trustee during the pendency of a suit brought against him, not merely to the land itself, but to the mortgages or other securities taken for the purchase money, against purchasers or assignees claiming title thereto, as well as the assignments made whilst the suit was pending. If, therefore, Rick had sold this bond and mortgage to the building association, pending the proceedings on the bill in equity, the principle of lis pendens would apply without doubt; but we are not aware that the doctrine has ever been carried to cases where the party to be affected by it was not strictly a purchaser, pendente lite, of the property in litigation. See Wade on Notice, 360."

In the case of Shyhoof against Fliteraft 1 Ashmead page 171, the syllabus reads as follows, viz:

"Where there exist two tribunals possessing concurrent and complete jurisdiction, the jurisdiction of that tribunal is exclusive which has first possession of the subject-matter of controversy."

King, President J. says: "I hold it to be a clear principal of jurisprudence, that when there exist two tribunals

possessing concurrent and complete jurisdiction of any question, that the jurisdiction of that tribunal, is exclusive which has first possession of the subject-matter in controversy." * * * *

* * * * Nothing would be more indecorous and disparaging to the administration of justice, than the racing for jurisdiction which would perpetually take place between justices ot the peace, if the course of precedure adopted in this case, is sanctioned by this court. The law does not, however, countenance it, but gives exclusive jurisdiction to the first justice, and consequently, any subsequent interference of another justice is illegal, and any judgment given by him between the parties, void for want of jurisdiction."

In the case of Frankel 1 vs. Satterfield, Superior Court of Delaware, 19 Atlantic Reporter page 898, Grubb J. says on page 900–901:

"Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no right can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an execution, or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in

any court where it is offered as a conclucive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal.

Folger vs. Slaughter, 33 La. Ann. 342.
Bledsoe vs. Erwin Id. 618.
Settlemeir vs. Sullivan 97 U. S. 444.
Eaton vs. Badger, 33 N. H. 228.
Green vs. Clawson, 5 Houst. 159.
Wall vs. Wall 123 Pa. St. 545. 16 Atl. Rep. 598.
Freem. Judgm. § 117.

This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question." * * * *

* * * * If the record produced shows that the court did not have jurisdiction of either the person of the defendant or the subject of the controversy, it must be disregarded, and the plea sustained; for, in such case, "there is no valid record upon which a recovery can be had, and, consequently, there is no such record as the plaintiff has set out in his declaration."

In the case of Taylor vs. Carryl 24 Pa. page 259, the syllabus reads as follows:

"1. A writ of foreign attachment issued from the Supreme Court of Pennsylvania, and first laid upon a vessel,

was not divested by a subsequent proceeding in rem in the United States Admiralty Court for mariner's wages.

"2. The mariners might have submitted to the State Court their claim to payment out of the proceeds of sale made subsequent to their proceeding in admiralty, their claims against the vessel being discharged by such sale, which was not made specially subject to their claims; and they might have intervened in the State Court for the protection of their interests.

"3. Either of the said Courts, by amicable arrangement between them, might have directed a sale of the vessel and payment of the mariner's claims; and the surplus might have been retained, or ordered into the other Court for further distribution."

Mr. Justice Lowrie says, page 269:

"From all this it seems to follow that the arrest for the sailors, depended for its efficacy upon a contingency that never happened. The proceedings in the State Court totally exhausted the subject-matter of their contingent seizure, and prevented it from ever reaching the District Court. Its decree was therefore in relation to a subject over which it had no control, *and was consequently void.*"

"A vessel was seized under a writ of foreign attachment issued from a court of the state of Pennsylvania, and while a motion for the sale of the vessel was pending in that court, a libel was filed in the district court of the United States, for wages due the seamen, process issued under it, and a sale was made by order of the district court. HELD that the district court *had no jurisdiction* over the vessel when its order for sale was made, and that the sale of the marshall

was inoperative. To give jurisdiction in rem, there must have been a valid seizure and an actual control of the ship by the marshall of the court; and this was not the case, inasmuch as the vessel was already in the actual and legal possession of the sheriff, under process from the state court."

Taylor vs. Carryl 20, How. 583.

"In the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail, does not depend upon the rights of the respective parties, to the property seized, whether the one was paramount to the other, *but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.*" Freeman vs. Howe, 24, How. 450.

"To give jurisdiction in rem, the seizure by the marshall must have been valid; and this is not the case where the vessel was at the time of seizure, in the actual and legal possession of a sheriff, under process issued from a state court."

Taylor vs. Carryl 20 How. 583.

The Gazelle, 1 Sprague 378.

The Julia Ann Id. 382.

"A sale of property under a proceeding in rem, as, for instance, a suit to enforce a mechanic's lien, instituted in a State court pending a proceeding in a Federal court to enforce a forfeiture of the property for violation of the revenue law, *passes no title to the purchaser;* and this is so, although the sale in the lien proceeding, is not made until after the property has passed from the possession of the Federal court

by delivery to the purchaser at the sale had in the forfeiture proceeding."

Heidritter vs. Elizabeth Oil Co. 112 U. S. 294.

In the case of Collins vs. Collins 37 Pa. page 387, the opinion of the court was delivered January 7, 1861, by Woodward, J.—"If the justice had not jurisdiction of the cause of action, the appeal was properly dismissed, even at the late hour at which the judge turned it out of court. It had better been dismissed before trial and verdict, but it is *never too late* in the progress of a cause to take advantage of the want of jurisdiction. It is urged on the authority of Lauchner vs. Rex, 8 Harris 469, that the defendant having submitted to a trial, and taken the chances of a verdict in his favor, cannot be admitted, after he finds himself defeated, to object to the jurisdiction. * * * *

* * * * *The defendant may object on that ground at any time.* Regularly, he ought to do it at the earliest possible moment; but laches, no more than consent, can confer jurisdiction, and therefore we cannot deprive the defendant of the benefit of his objection, late and untimely as it was."

"A state court having gained a prior jurisdiction by service of process, is not deprived thereof by actual seizure of the property by the officer of the U. S. court having concurrent jurisdiction."

Owens vs. Ohio Central R. R. Co., 20 Fed. Rep. 10.

"If a state and federal court have concurrent jurisdiction of the subject-matter of a suit, the court in which legal proceedings are first instituted acquires jurisdiction, to the exclusion of the other court."

Parks vs. Wilcox, 6 Col. 489.

"Objection to the jurisdiction of the person may be waived by the act of the party; want of jurisdiction of the subject-matter is never thus waived." (Following 26, N. H. 232 1872.)

Damp vs. Dane 29, Wis. 419.

State vs. Tappan, Id. 664.

"Jurisdiction cannot be conferred by consent of parties."

Cerro Gordo County vs. Wright County, 59 Iowa 485.

"Want of jurisdiction of the subject-matter cannot be waived by consent of parties."

Brondberg vs. Babbott, 14 Neb. 517.

"The institution of a suit in a court that has no jurisdiction is null; and the subsequent investiture of jurisdiction will not cure the nullity.

1869—Mora vs. Kuzac, 21 La. Ann. 754."

"Pending proceedings in a State court by a national bank, to foreclose a mortgage, executed to it by A. and duly recorded, B., his creditor, recovered against him in the U. S. circuit court a judgment which, by the lex loci, was a lien on the equity of redemption. B. then filed his bill in the latter court against A. and the bank to set aside the mortgage as illegal, or to have certain alleged payments of usurious interest applied to reduce the debt. Shortly thereafter, the State court rendered a decree of foreclosure and sale, which the bank set up in its answer to the bill. The circuit court thereupon dismissed the bill.

HELD: 1.—That the state court having first acquired jurisdiction of the subject-matter, its decree was a bar to the further prosecution of the suit against A. and the bank.

2.—That A. represented all the parties who, pending the foreclosure proceedings, acquired through him an interest in or a charge on the mortgaged land, and that B., although not a party to them, was bound by the decree therein rendered."

Stout vs. Lye, 103 U. S. 66.

"A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded within the general scope of the subject-matter of the suit."

Ward vs. Todd, 103 U. S. 327.

"Jurisdiction over the subject-matter of a suit cannot be conferred by consent, nor can the right to object for want of it be lost by acquiescence or neglect."

School Trustees vs. Stocker 42 N. J. L. 115.

"Where the jurisdiction of a court has once vested, it cannot be ousted by subsequent events."

Estes vs. Martin 34, Ark. 410.

"Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands, that, having been once so tried, all litigation of that question, and between those parties, should be closed forever."

1 Greenleaf on Ev. (12th Ed.) page 559, section 522.